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Reply to: Memphis Office

October 11, 2002

The Honorable John Tanner  
United States House of Representatives  
1226 Longworth House Office Building  
Washington, DC 20510

RE: S 2869 and HR 4738

Dear Representative Tanner:

Legislation has been proposed (S 2869 and HR 4738) that would allow winning bidders in the FCC's Frequency Auction 35 to back out of their payment obligations to the U.S. Government. The FCC is also seeking comments on a similar proposal it is considering. Eldorado strongly opposes the legislation and the FCC's proposed course of action.

The licenses for which Auction 35 winners are trying to avoid payment were awarded originally in 1996, as part of the auction of C Block licenses (Auction 5). In the C Block auction, NextWave bid up the value of the licenses and then declared bankruptcy. This effectively destroyed the confidence of the financial markets in the C block. As a result of the changed economic environment, solvent, responsible Auction 5 winners such as Eldorado were unable to obtain necessary financing to construct their networks.

The FCC then offered winning Auction 5 bidders three options: forfeit their down payments and return their licenses, forfeit half of their down payments and return half of their licenses, or pay full price and keep their licenses. Eldorado and many other small businesses had no choice but to return their licenses and forfeit their downpayments. In so doing, they were also precluded from reacquiring their surrendered licenses for two years from the date of any re-auction of those licenses.

In contrast, the FCC has treated Auction 35 winners in an overwhelmingly more favorable manner. The FCC has already refunded 85% of the down payments made by Auction 35 winners. On top of that, the pending Senate and House bills and the FCC's proposal would allow the winning bidders of Auction 35 (in the language of Section 2 of the House and Senate bills) to be "free of all obligations such winning bidder would otherwise have with respect to such license, including the obligation to pay the full amount of its winning bid". The FCC even asks in its proposal whether Auction 35 winners who return their licenses should be held to the same standard as Auction 5 winners; i.e. precluded from reacquiring their surrendered licenses for two years from the date of any re-auction of those licenses.

Eldorado and other Auction 5 winners had no prior knowledge of NextWave's bankruptcy plan and its effects. In contrast, the situation facing the large wireless companies who were Auction No. 35 winners and who now are trying to avoid payment is the result of their informed business decisions. The FCC specifically cautioned potential Auction No. 35 bidders that on-going litigation could impede timely access to the spectrum and stated, with emphasis, that:

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*Potential bidders are solely responsible for identifying associated risks, and investigating and evaluating the degree to which such matters may affect their ability to bid on or otherwise acquire licenses in Auction No. 35.<sup>1</sup>*

If a private individual were to knowingly buy land with a clouded title and then seek to avoid the obligation when title litigation ensues and the real estate market craters, should the government cash him out? There is no difference between that situation and the situation that the Auction 35 participants have created for themselves.

However, in the event Congress and the FCC decide to continue to accord preferential treatment to Auction 35 winners, Auction 5 winners should be treated at least as well. First and foremost, less favorable treatment of the Auction 5 winners would contravene Congressional and FCC policy. The frequencies auctioned in Auction 35 were originally reserved "small businesses, rural telephone companies and businesses owned by minorities and women. . . ."<sup>2</sup> Judging from the identity of the Auction 35 winners who are bankrolling the payment avoidance effort, the definition of "small businesses, rural telephone companies and businesses owned by minorities and women" somehow got expanded on the way to the Auction.

Granting the Auction 35 winners benefits not available to the Auction 5 winners would decrease future bidders' incentives to comply with FCC rules. It would also undermine the integrity of the FCC's auction process, especially for small businesses who lack the clout to lobby their way out of trouble when market conditions change.

The Congress and the FCC should, at last, face up to the fact that, because of NextWave's auction schemes and swings in the value of C block licenses, the entire C block auction process - both Auctions 5 and 35 - has been a bunt. There can be no legal or equitable justification for allowing Auction 35 winners a money-back exit from risky obligations they knowingly undertook while continuing to hold the funds of Auction 5 participants. While part of the remedy is financial, the FCC should also seek comment on how to provide Auction 5 winners a mechanism to recoup the business opportunities lost in the wreckage of the C block auction.

Eldmido respectfully urges you to oppose the pending legislation and to encourage the FCC to make no special exceptions for Auction 35 participants unless Auction 5 winners are provided relief. Neither the US Congress nor the FCC should change its course solely for the benefit of Auction 35 winners, while giving no consideration to the forfeited deposits and significant opportunity costs of Auction 5 winners.

Sincerely,



Stephen M. Roberts  
Managing Director

<sup>1</sup> C And F Block Broadband PCS Spectrum Auction Scheduled For December 12, 2000 Notice and Filing Requirements for 422 Licenses in the C and F Block Broadband PCS Spectrum Auction, 15 FCC Rcd 19485, 19493 (2000) (emphasis in original); see also Sept. 6, 2001, Public Notice at 17256 (emphasis in original).

<sup>2</sup> 47 U.S.C. § 309(j)(3)(B); see also Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Service (PCS) Licenses, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436, 16438 (1997).